Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PHILLIP M. KABEALO,

Petitioner,

v.

HUNTINGTON NATIONAL BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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53 pp

QUESTIONS PRESENTED

An exception to the statute of limitations provides that a cause of action for speculative damages does not accrue until they are suffered or become provable. Petitioner could not prove whether his damages were worth either zero or ten million dollars unless and until a permit application was decided. The permit was eventually issued after the original limitations period had expired. The court below granted defendant's motion for summary judgment holding that Petitioner's claim was barred by the statute of limitations. The following questions are presented:

1. Whether the facts are to be construed in a light most favorable to a party opposing a motion for summary judgment when that party asserts an exception to the statute of limitations.

2. Whether the court deprived Petitioner of his Seventh Amendment rights when it did not allow a jury to determine whether the damages were speculative.

LIST OF PARTIES

The two parties to the proceedings are and in this Court are Petitioner Phillip M. Kabealo, the plaintiff-appellant-cross appellee below, and Respondent The Huntington National Bank, the defendant-appellee-cross appellant below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Phillip M. Kabealo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is not yet reported. The opinion of the district court (*Id.*, 14a-23a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 18,

1994. *Id.*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment VII provides:

> At suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 11 of the Federal Rules of Civil Procedure provides, in relevant part, that:

> * * * The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * *

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

> together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

28 U.S.C § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

12 U.S.C § 1971 provides:

As used in this section, the terms "bank", "bank holding company", "subsidiary", and "Board" have the meaning ascribed to such terms in section 2 of the Bank Holding Company Act of 1956 [12 USCS §1841]. For purposes of this section only, the term "company", as used in section 2 of the Bank Holding Company Act of 1956 [12 USCS §1841], means any person, estate, trust, partnership, corporation, association, or similar organization, but does not include any corporation the majority of the shares of which are owned by the United States or by any State. The term "trust service" means any service customarily performed by a bank trust department.

12 U.S.C § 1972 provides, in relevant part, that:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this section.

12 U.S.C § 1975 provides:

Any person who is injured in his business or property by reason of anything forbidden in subsection (b) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

12 U.S.C § 1977 provides:

(1) Subject to paragraph (2), any action to enforce any cause of action under this section shall be forever barred unless commenced

within four years after the cause of action accrued.

(2) Whenever any enforcement action is instituted by or on behalf of the United States with respect to any matter which is or could be the subject of a private right of action under this section, the running of the statute of limitations in respect of every private right of action arising under this section and based in whole or in part of such matter shall be suspended during the pendency of the enforcement action so instituted and for one year thereafter: Provided, That whenever the running of the statute of limitations in respect of a cause of action arising under this section is suspended under this paragraph, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within the four-year period referred to in paragraph (1).

STATEMENT OF THE CASE

Petitioner filed a Complaint on November 7, 1988 against the Huntington National Bank and three individual defendants. App., *infra* 15a. Petitioner brought allegations that the Bank violated the Bank Holding Company Act, 12 U.S.C. §1971 *et. seq.* and, jointly with the individual Defendants, violated Ohio law. App., *infra* 15a. The claims dealt with actions taken by Huntington National Bank between 1982 and 1985. *Id.* at 2a. The jurisdiction of the District Court was invoked under 12 U.S.C. §1975 and federal question jurisdiction under 28 U.S.C. §1331. The District Court granted Huntington National Bank's motion for partial summary judgment by an order entered on November 13, 1992. App., *infra* 22a. The court found that Petitioner's two Bank Holding Company Act claims were barred by the applicable four year statute of limitations. *Id.* The Court of Appeals for the Sixth Circuit affirmed the order of the District Court. *Id.* at 13a. This petition for certiorari is limited to consideration of the dismissal of Petitioner's 1982 claim with regards to the Huntington National Bank's actions as described below.

Petitioner's 1982 claim under the Bank Holding Company

Act was based on the assertion that the Bank forced Petitioner to share ownership of a landfill operation with others of the Bank's choosing in connection with providing a loan. App., *infra* 5a. Petitioner alleged in his complaint that this constituted a prohibited tying arrangement in violation of 12 U.S.C. §1972 (*id.* at 2a); the applicable limitations period for which was four years. 12 U.S.C. §1977. Petitioner sought damages based on the value of the interest in Logan Waste Control that he was forced to share with the other owners. Petitioner did not seek lost profits from the company's operations or any other damages that may have been incurred or have been otherwise provable in 1982 or the following four years.

Petitioner alleged that from 1982 to 1987 the value of the company was speculative because of uncertainty with regards to the pending changes with regards to the company's principal asset, the operation of a landfill located in Logan County, Ohio. App., *infra* 6a. These changes were not possible until the Ohio Environmental Protection Agency approved the application and issued a Permit to Install. *Id.* Petitioner provided evidence showing that the Logan landfill operation was the primary asset of Logan Waste Control. Petitioner's evidence showed that the value of a landfill operation was based on its available air space (*Id.*) and that the Logan landfill's available airspace was nearly exhausted. Petitioner presented evidence that the company could apply for an expansion of the usable air space for the Logan landfill operation through the Ohio Environmental Protection Agency once the company met certain conditions related to the operation of the landfill. *Id.* at 3a. The evidence showed that, after the landfill operation was acquired, the company immediately undertook action to meet these conditions and an application for the permit was made. Petitioner's evidence showed that without the expansion, the operation of the Logan landfill had little or no value as a going concern because of the limited available air space, the previous poor operating procedures, and the potential substantial costs of closure for the site. *Id.* at 6a. Petitioner's evidence showed that if the permit was issued then the increase in available air space would allow the landfill to remain in operation and its value would exceed ten million dollars. *Id.*

Petitioner's evidence showed that in 1986 Huntington National Bank refused to make an additional loan to Logan Waste Control without personal guarantees from the shareholders, citing uncertainty about the status of the permit. Finally, the evidence showed that the Permit to Install was issued in 1987, after the limitations period for a violation under 12 U.S.C. §1977 had closed. App., *infra* 3a.

Petitioner alleged that from 1982 to 1987 the damages sought had not been incurred because their accrual was speculative and their amount was unprovable. *Id.* at 6a. These damages were not actually suffered until the Permit to Install was issued because prior to that time there was no proof available to predict what the Ohio Environmental Protection Agency would do with regards to Petitioner's application. Thus, prior to the issuance of the permit in 1987, Petitioner alleged that it would have been impossible for a factfinder to ascertain the size and value of the landfill. Therefore, under the doctrine announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), Petitioner alleged that a new cause of action accrued when the permit was issued and the value of the landfill operation became ascertainable. App., *infra* 5a.

Huntington National Bank countered Petitioner's evidence by submitting a five year income projection prepared by Petitioner that accompanied a proposal to the Bank for a loan in 1982. *Id.* at 7a. The Bank also submitted additional cash flow projections that were submitted by Logan Waste Control in April and October of 1983, when additional loans were requested. Finally, the Bank stated that Petitioner had four years' experience operating the landfill by the time the statute of limitations expired in 1986. *Id.* These projections were based on the company's then current operations and were prepared to demonstrate the company's ability to service additional debt with its existing cash flow. These projections were not intended to represent the value of the company and did not in any way take into account the potential expansion of the landfill and the effects that this would have on the company's income and cash flow. All of the Bank's evidence was irrelevant

because Petitioner never claimed or sought damages based on the income or cash flow of the company.

On August 7, 1992, at the final pretrial conference, the District Court granted leave for the Bank to file a Motion for Summary Judgment. *Id.* at 15a. On August 21, 1992, the Bank filed its Motion for Partial Summary Judgment, asserting that Petitioner's claims under the Bank Holding Company Act were barred by the applicable statute of limitations. The District Court stated: "Plaintiffs have not shown that this action could not have been brought against defendant within the required four year period because of an inability to prove that they suffered any type of damage during that time period." *Id.* at 21-22.

On appeal, the Sixth Circuit affirmed the trial court's decision. The court correctly held that the *Zenith* exception applied in civil actions under the Bank Holding Company Act. *Id.* at 8a. The court then held that plaintiff failed to meet his burden of proving that the amount of damages was speculative, stating that "all presumptions are against" a party asserting an exception to the statute of limitations. *Id.* at 10a.

REASONS FOR GRANTING THIS PETITION IN CERTIORARI

The decision of the Court of Appeals for the Sixth Circuit provides that a plaintiff defending against a motion for summary judgment must prove that an exception applies without the benefit of having the record construed in a light most favorable to him or her. App., *infra* 9a-12a. This decision conflicts with the decisions in other circuits and is inconsistent with this Court's interpretation of Rule 56(c) of the Federal Rules of Civil Procedure as presented in *Poller v. Columbia Broadcasting System*, 368 U.S. 486 (1962) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Additionally, the decision below is erroneous because it misapplies the *Zenith* exception and deprives Petitioner of his Seventh Amendment right to submit disputed facts to a jury. Finally, the different circuits have not been clear or consistent in applying the

Zenith exception. The courts have shown confusion in determining whether damages are "speculative" and have used contradictory rules for deciding when the subsequent cause of action accrues. As a consequence, this petition should be granted or, alternatively, the decision below should be summarily reversed.

I. The decision of the Court of Appeals conflicts with the decisions of this Court and of other Circuits.

It is important for this Court to review the decision of the Court of Appeals for the Sixth Circuit in order to clarify the principles applicable to Rule 56(c) of the Federal Rules of Civil Procedure. The Sixth Circuit's decision, in affirming the judgment of the District Court to dismiss Petitioner's claim, creates a conflict of legal authority. When discussing the Petitioner's responsibility for proving the applicability of the *Zenith* exception, the Court of Appeals cited the rule from *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974) that a party seeking the benefit from an exception to the statute of limitations has the burden of proof on that issue. "*All presumptions are against him*, since his claim to exemption is against the current of the law and is founded on exceptions." [emphasis added] App., *infra* 9a-10a. The Court of Appeals then applied this rule to the Bank's motion for summary judgment and construed the facts as to the speculative nature of the damages in a light that was not most favorable to Petitioner. Thus, in the Sixth Circuit, a plaintiff asserting an exception to the statute of limitations in defense of a motion for summary judgment is required to prove that the exception applies without having the record construed in a light most favorable to him or her.

This Court has long held that when ruling on a motion for summary judgment, the facts are to be construed in a light most favorable to the party opposing the motion. Fed. R. Civ. P. 56(c); *Poller*, 368 U.S. 486; and *Adickes*, 398 U.S. 144. Courts in at least four other circuits have followed this rule where the party defending against the motion was asserting an exception to the statute of limitations. *Hildebrand v. Hildebrand*, 736 F. Supp.

1512 (S.D.Ind. 1990); *In re Professional Financial Management, Ltd.*, 703 F. Supp. 1388 (D.Minn. 1989); *Walder v. Paramount Publix Corporation*, 132 F. Supp. 912 (D.C.S.D.N.Y 1955); and *Sheets v. Burman* 322 F.2d. 277, at 278 (5th Cir. 1963).

The factual issue in dispute is whether the value of Logan Waste Control was provable. The primary asset of the corporation was the operation of the Logan landfill and the value of the landfill was based on its available airspace. The available airspace of the Logan landfill could not be determined until the Ohio Environmental Protection Agency either issued or denied a Permit to Install. Therefore, if the pending action by the Ohio Environmental Protection Agency was unprovable, then the value of Logan Waste Control's primary asset would be uncertain and the value of the corporation would also be unprovable. Valuation of damages contingent upon a future event is an issue that has been considered by the courts.[1] In *Wilson v. Johns-Manville Sales Corp.*, 694 F.2d 111 (D.C.Cir. 1982), Judge Ruth Bader Ginsburg described the American rule for the valuation of contingent damages.

> The traditional American rule, adopted in the District of Columbia, is that recovery of damages based on future consequences may be had only if such consequences are "reasonably certain." Recovery of damages for speculative or conjectural future consequences is not permitted. To meet the "reasonably certain" standard, courts have generally required plaintiffs to prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur. If such proof is made, the alleged future effect may be treated as certain to happen and the injured party may be awarded full compensation for it; if the proof does

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[1]*See* Note, *Damages Contingent Upon Chance*, 18 Rutgers Law Review 875, at 893.

> not establish a greater than 50% chance, the injured party's award must be limited to damages for harm already manifest.

Wilson, 684 F.2d at 119. This rule is followed in Ohio. *Moe Light, Inc. v. Foreman*, 238 F.2d 817 (6th Cir. 1956) and *Gibbons v. Baltimore & O. R. Co.*, 92 Ohio App. 87 (Lucas Co. 1952). Thus, with regards to contingent damages, a plaintiff must prove that the chance that the contingency will occur is greater than fifty per-cent, in order to recover damages. *Wilson*, 694 F.2d at 119. If the damages are not capable of being proven, then a cause of action does not accrue until they become provable. *Zenith*, U.S. at 339.

Petitioner was seeking an exception to the statute of limitations and presented evidence. This evidence was provided to show that Petitioner was unable to measure his damages prior to the issuance of the Permit to Install in 1987. However, the Sixth Circuit required more; the Court required Petitioner to prove this point and to do so without the benefit of having the record construed in a light most favorable to him. App., *infra* 9a-12a. In spite of the substantial evidence presented by Petitioner, the Court stated:

> * * *[W]e conclude that the plaintiffs *did not carry their burden of proving* that their losses were so speculative as to excuse their failure to file this suit within the period of limitations. Their own projections and their actual experience during four years of operation would have been sufficient basis for calculating their damages. * * *

[emphasis added] App., *infra* 11a.

Courts in other circuits have construed the record favorably for plaintiffs and denied motions for summary judgment where evidence to support the application of an exception to the statute of limitations was presented. *Hildebrand v. Hildebrand*, 736 F.Supp. 1512 (S.D.Ind. 1990) dealt with determining when injuries for a

parent's sexual and psychological assault against a minor child became ascertainable in order for a cause of action to accrue. The District Court stated that the question of when a cause of action accrues is generally an issue to be resolved by the jury. *Id.* The court noted that the applicable limitations period was two years and that, in order to prevail on his motion for summary judgment, the defendant must have proven that the plaintiff commenced her action more than two years after the point in time when she could have reasonably ascertained her damages. *Id.* If there were facts sufficient for a jury to decide that the plaintiff sued within two years of her injuries becoming ascertainable, summary judgment must be precluded. *Id. In re Professional Financial Management, Ltd.*, 703 F. Supp. 1388 (D.Minn. 1989) dealt with plaintiffs seeking the equitable tolling of the statute of limitations due to fraudulent concealment. The court noted, on the defendants' motion for summary judgment, that the plaintiffs had the burden of showing that there was a reasonable factual dispute regarding when they should have discovered the fraud. However, the court went on to state that "All material facts and inferences are to be construed in favor of plaintiffs as the non-moving parties." *Id. Sheets v. Burman*, 322 F.2d. 277, (5th Cir. 1963), involved a claim for medical malpractice and a law providing that the statute of limitations is tolled as to an injured patient until there is knowledge of the act causing the damage or until the termination of the doctor patient relationship. *Id.* at 280. The Fifth Circuit acknowledged that some of plaintiff's evidence was not clear but it still reversed the District Court's dismissal and ruled that the plaintiff was entitled to an opportunity to present evidence in support of her disputed allegation to a jury. *Id.* In *Walder v. Paramount Publix Corporation*, 132 F. Supp. 912 (D.C.S.D.N.Y 1955), the plaintiff asserted that the limitations period was tolled because the defendant had insufficient contacts with the state. The court made note of the fact that the defendant provided "little evidence of probative value" on the issue and that the defendant had relied on allegations in the complaint. *Id.* at 919. The court further noted that the plaintiff did not touch on this point in its affidavit in opposition to the motion. *Id.* at 920. Nonetheless, the court held that this did not entitle the defendant to summary judgment. *Id.*

It is clear, at least in the Second, Fifth, Seventh, and Eighth Circuits, that the record will be construed in a light most favorable to the non-moving party. In these circuits motions for summary judgment will be denied where a non-moving party defending against it submits substantial evidence to prove an exception to the statute of limitations. The Sixth Circuit has created a contradictory rule that imposes an impossible burden on non-moving parties by requiring them to prove this issue without the benefit of having the evidence construed in a light most favorable to them. This Court should grant certiorari to review this important conflict. To do otherwise would allow a precedent to stand that would cut off plaintiffs from their right to submit facts to juries whenever the application of an exception to the statute of limitations is sought.

II. The decision of the Court of Appeals was erroneous and deprives Petitioner of his Seventh Amendment right to a trial by jury.

The right to a trial by jury in civil cases is guaranteed by Amendment VII of the Constitution of the United States and is not limited by Rule 56 of the Federal Rules of Civil Procedure where the parties have issues to try. *Poller*, 386 F.2d at 467. The purpose of summary judgment is to go beyond the pleadings and to assess the proof in order to see whether there is a genuine need for a trial. *R.J. Reynolds Tobacco Company v. Hudson*, 314 F.2d 776, at 788 (5th Cir. 1963). Summary judgment should only be entered when the pleadings, depositions, affidavits, and admissions filed in the case show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c) and *Poller*, 368 U.S. 486. "[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944). To allow for a summary judgment in cases where material facts are disputed would be to deprive parties

of their Seventh Amendment rights.[2]

As shown above, certainty of damages is a material issue to be decided by a jury. *Wilson*, 684 F.2d 119 and *Hildebrand*, 736 F.Supp 1512. Petitioner presented substantial evidence showing that the value of the Logan landfill was not provable until after the Ohio Environmental Protection Agency either issued or denied the Permit to Install. Prior to the actual issuance, it was impossible to prove what action the Ohio Environmental Protection Agency would take on Logan Waste Control's application for the permit. The Court of Appeals correctly ruled that the *Zenith* exception to the statute of limitations applies to claims under the Bank Holding Company Act, but then held that Petitioner did not meet his burden of proving that his damages were uncertain. In justifying its decision, the Court wrote that if Petitioner was uncertain about the measure of his damages then he should have filed his action during the original limitations period and sought a stay. App., *infra*, at 11a-12a.

The Sixth Circuit's rule is that if a plaintiff has suffered damages, some that are provable and some that are not, a suit must be filed within the original limitations period or else all of that plaintiff's claims will be barred. This rule is inconsistent with the *Zenith* exception that the court supposedly applied. This Court wrote in *Zenith* that a plaintiff must bring an action within the appropriate limitations period in order to recover damages that have been suffered or are provable *at the time of the defendant's acts.* 401 U.S. at 339.

> On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, *future damages that might arise from the conduct*

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[2]*See* Brunswick Corp. v. Vineberg, 370 F.2d 605, (5th Cir. 1967); Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir. 1980); and *Sartor* , 321 U.S. 620.

> *sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature are unprovable.*
>
> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. *In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered*; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

[emphasis added] *Id.* Thus, the fact that some damages may be provable does not alter the fact that other damages are unprovable. *Id.* A cause of action for those speculative damages will only accrue once they become certain even if this is after the original limitations period has closed. *Id.*

The Sixth Circuit gave significant weight to the income and cash flow projections that Petitioner provided to Huntington National Bank in connection with loan applications. App., *infra* 11a-12a. The Sixth Circuit cited *Charlotte Telecasters v. Jefferson-Pilot Corp.*, 546 F.2d 570 at 573 and 574 (4th Cir. 1976), and stated that the income projections were sufficient evidence for calculating the value of Petitioner's interest in Logan Waste Control. App., *infra* 10a-11a. The court overlooked the fact that Petitioner never claimed or sought redress for any damages based on the income or cash flow of the company. The court also overlooked the fact that the projections were not prepared as a basis for calculating the value of the company and, as such, were not appropriate for that purpose. This is especially true in light of the changes that would result if the Permit to Install was issued; changes that were not addressed by the projections.

> Earnings usually reflect most of the other factors indicated [for valuing a corporation] except in the

> case of a new enterprise, a new product, or a new market, *or some other new element* which has not been in existence sufficiently long to make itself felt in the earnings record.

[emphasis added] *O'Malley v. Ames Earnest*, 197 F.2d 256 (8th Cir. 1952). The potential to expand the available air space for the Logan landfill operation was such a "new element" and its effect on the value of the corporation could not be ascertained until the Permit to Install was issued. *Wilson* 684 F.2d at 119. The possibility that Petitioner may have recovered certain other damages during the original limitations period is irrelevant. The court should have focused its attention on the existence and provability of the damages actually claimed by Petitioner.

Evidence was presented showing that the size, and thus the value, of the company's primary asset, the Logan landfill operation, was contingent on a future event at the time of the alleged anti-tying violation by Huntington National Bank. An examination of other decisions shows that courts have applied the *Zenith* exception where the measure of damages is contingent on a future event. In *Archer v. Airline Pilot's Association International*, 609 F.2d 934 (9th Cir. 1979) *cert. denied* 446 U.S. 953 (1980), the Ninth Circuit ruled that damages based on contingency fees payable to an attorney were speculative. The plaintiff was an airline pilot who brought an action against his labor union for failing to represent him in an action against an airline in 1971. After discussing the measurability of the plaintiff's damages, the court held that the applicable three year statute of limitations was not a bar to plaintiff's claim because of the *Zenith* exception. While the defendant's motion to dismiss was granted on other grounds, the court stated:

> Until settlement was reached on April 15, 1975, it was impossible to estimate the amount Archer would eventually owe his counsel: the size of the fee could have ranged anywhere from zero to tens of thousands of dollars. Had Archer sued ALPA

> for reimbursement of the contingent fee at any time prior to April 15, 1975, his suit undoubtedly would have been dismissed on the ground that the damages sought were unduly speculative.

609 F.2d at 938. The court held that these contingent fees were speculative even though there was evidence that a jury could have used to estimate the amount. The plaintiff knew the amount of his claim against the airline and the fees were based on a fixed percentage of the recovery made. These fees were speculative because the plaintiff could not prove that he would win his case against the airline. Likewise, the value of Logan Waste Control's principal asset was also contingent on a future, unprovable event: the issuance or denial of the Permit to Install. A court in 1986 would have had no choice but to dismiss most of Petitioner's claim because he would have been unable to prove, more likely than not, that the Permit to Install would be issued. *Archer*, 609 F.2d at 938; *Wilson*, 684 F.2d at 119; *Story Parchment*, 282 U.S. 555 (1931); and *Central Trust Co. v. Clark*, 92 F.2d 293 (8th Cir. 1899).

Summary judgment is appropriate where the party opposing it fails to submit evidence. *Charlotte Telecasters*, 546 F.2d at 573 and 574. It is also appropriate where only issues of law are to be decided. 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, CIVIL 2d.; §2725, page 79. However, when there is a genuine dispute of the facts on material issues, this Court has held that it is inappropriate for a court to grant summary judgment. *Sartor*, 321 U.S 620. "Before the court can apply the law, it must have an adequate factual basis for doing so." 10A FEDERAL PRACTICE AND PROCEDURE 2d *supra* §2725, 85. Determination of complex questions of law frequently requires a more concrete factual development than may be obtained through summary proceedings. *Id.* at 88. Weighing of factual matters is inappropriate on a motion for summary judgment. *Hoover v. Valley Community Hospital*, 545 F. Supp. 8 (D.C.E.D. Tenn. 1981). "Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

> To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force.

Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

This Court has expressed concerns about summary proceedings: "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice." [some quotation marks omitted] *Poller*, 368 U.S. at 473. Petitioner's case is an example of the dangers inherent in summary proceedings. Credible, probative evidence on a material issue was kept from a jury because a judge was not persuaded by the dry presentation of the facts in Petitioner's affidavits. Summary judgment is a valuable tool for striking through sham claims and defenses which stand in the way of the direct approach to the truth of a case, but it must not be used to deprive a litigant of his right to a jury trial. *Whitaker*, 115 F.2d 305. It is inappropriate for a judge to substitute his or her judgement for that of a jury when dealing with issues where reasonable people could reach different conclusions. Such cases must be submitted to a jury. Note, *Damages Contingent Upon Chance*, 18 Rutgers Law Review 875, n.95 at 832-893. "To make it a question of law would flirt with constitutional questions concerning the right to a jury trial as well as threaten sensible administration." Coons, *Approaches to Court Imposed Compromise-The Uses of Doubt and Reason*, 58 Northwestern University Law Review 750, 761-762 (1964). Petitioner provided substantial evidence as to the contingent nature of the damages. In light of this evidence, and the contested nature of the issues involved, he had a right to submit this evidence to a jury. It was inappropriate and unconstitutional for the Sixth Circuit to deprive Petitioner of this right and it is imperative that this Court correct this error.

III. The question presented is important.

The Sixth Circuit's decision is the first to specifically hold that the *Zenith* exception to the statute of limitations applies to claims under the Bank Holding Company Act. As shown above, the court became confused as to Petitioner's burden of proving the speculative nature of his damages. There is also a potential for confusion as to the date of accrual for a subsequent cause of action. The decision below will be cited as a precedent in future cases where extensions of the *Zenith* exception are sought. It is imperative that this Court correct the Sixth Circuit's errors so that this case will not add to and perpetuate the confusion regarding the *Zenith* exception

a. There is confusion with regards to uncertainty of damages

When this Court created the *Zenith* exception, it was intended to provide relief for injured parties where the amount of the injury could not be ascertained until after the applicable limitations period had passed. The exception was a response to the concern that the combined effect of the statute of limitations and the bar against awards for uncertain damages would defeat the deterrent effect of private actions under anti-trust and treble damage actions. *Zenith*, 401 U.S. at 340. Unfortunately, this Court did not give a clear definition of the degree of uncertainty necessary for the doctrine to apply. The decisions applying the exception have not been helpful in fleshing out its application since detailed and exact factual expositions are rare. Those cases that consider the *Zenith* exception have generally been so conclusory that it is impossible to determine how the courts reached their decision.[3]

Uncertainty about the existence of damages affects the

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[3] *E.g. Charlotte Telecasters*, 546 F.2d 570; *Jackson v. Union Nat. Bank of Macomb*, 715 F.Supp. 892 (C.D.Ill. 1989); and *Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74 (6th Cir. 1981).

valuation of the damages. *Wilson*, 684 F.2d at 119. Courts frequently recite a rule that uncertainty as to the existence of damages precludes recovery whereas uncertainty as to the amount of damages does not. This has not prevented courts from confusing proof of the existence of damages for proof of the measure of damages. A warning about the potential for misapplication of this seemingly simple rule was written by Ronald M. St. Marie in *Avoiding the Antitrust Statute of Limitations under* Zenith*: A Decade of Inconsistency*, 55 Southern California Law Review 255 (1981).

> Many courts have applied the *Zenith* exception to the measure of damage without explicitly discussing the pertinent burden of proof. This inexact use of the exception may lead lower courts to wrongly apply the stricter burden of proof required of a plaintiff proving fact of damage to determine whether the measure of damages was previously ascertainable. Such an application would be contrary to the purpose of the exception, *i.e.*, to allow recovery of future damages otherwise barred by the statute of limitations, because that recovery could not have been had in a previous, timely suit.

St. Marie, *supra* at 279-80.

The Sixth Circuit, citing *Charlotte Telecasters* as authority, held that all of Petitioner's damages were provable because he was able to generate income and cash flow projections for Logan Waste Control. The court did not consider the distinctions between Petitioner's case and the facts in *Charlotte Telecasters*. In particular, the court overlooked the fact that Petitioner was not seeking damages for lost profits during the limitations period. Furthermore, the court did not analyze the contingent nature of the damages Petitioner sought. The plaintiff in *Charlotte Telecasters* alleged that it was harmed in March 1967 when the City Council refused to grant a cable television franchise. The plaintiff further

alleged that the existence of this harm did not become certain until thirty days after the plaintiff's request for reconsideration was made on August 7, 1967 and ignored. Plaintiff filed its complaint on September 7, 1971. The Fourth Circuit denied the application of the *Zenith* exception because the existence of the damages was not uncertain; the record did not show any likelihood that the Council would reconsider its denial of the franchise. The amount of the damages was not uncertain because projections of cash flow and income were possible based on the assumption that a franchise was issued. The facts alleged by Petitioner were substantially different. First, the contingent event, the issuance of the Permit to Install, had not yet occurred. In *Charlotte Telecasters* the franchise had already been denied. Second, the decision to grant or deny the permit was to be made by an unrelated third party and it was not reasonable to assume that the permit would be issued. In *Charlotte Telecasters* the decision to issue the permit was made by the defendant and it was reasonable to assume that it would stand. Third, the projections presented were irrelevant for calculating Petitioner's damages because they ignored the effects that the issuance of the permit would have on Logan Waste Control's income. In *Charlotte Telecasters* the projections considered were derived from the very assumptions upon which the plaintiff's alleged harm was based.

b. Further confusion is likely

The Sixth Circuit misunderstood the ruling in *Zenith* when it stated that if the Petitioner could not present sufficient evidence during the original limitations period then he "could have filed suit and requested a stay until the administrative proceedings before the OEPA were concluded." App., *infra* 11a-12a. The court overlooked the fact that there was no way for anyone to predict when the Ohio Environmental Protection Agency would act on Petitioner's application, or what that action would be. These contingencies made it impossible for Petitioner to calculate, or seek recovery for, his damages until after the Permit to Install was actually issued. *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931). *Zenith* is an exception to the statute of limitations, not to the prohibition against speculative damages.

The Sixth Circuit's comments, regarding filing suit and seeking a stay, contradicts the reasoning for the rules in *Zenith* and *Wilson*. How is the jury to determine a value for an injury that is not certain to occur? What would be the grounds for a court to grant such a stay? More importantly, what would prevent the courts from being flooded with numerous premature claims by plaintiff's seeking a safe harbor for their contingent claims? The confusion regarding the plaintiff's burden and the ambiguity regarding the accrual of the subsequent cause of action leaves injured parties with little security. Without additional clarification of the *Zenith* exception, plaintiffs with contingent injuries will have little choice but to follow the Sixth Circuit's approach and file their claims prematurely. Many of these premature cases will be a waste of court time since they will be dismissed because the damages are unprovable or because the potential injuries do not occur. Rule 11 of the Federal Rules of Civil Procedure and the general concern for judicial economy stand against any policy that would encourage parties to file actions that are likely to be dismissed.

The Sixth Circuit's approach would also have a high potential for injustice. Juries would be tempted to discount the damages for the very uncertainty that the plaintiff was seeking to avoid. Such an approach would side-step the American rule with regards to contingent damages as found in *Wilson*, 684 F.2d 119. If the contingent event occurs, the plaintiff could be left with only a percentage of the full damages and would be precluded from seeking full recovery. If the contingent event does not occur, the defendant would be left having paid for damages that the plaintiff did not suffer.

The Sixth Circuit's decision will be an important precedent for all future cases where application of the *Zenith* exception is sought outside of antitrust law. Unless the errors in the Sixth Circuit's decision are clarified and corrected, they will add to the ambiguity and confusion that already faces plaintiffs seeking to apply this exception.

CONCLUSION

The refusal of the Sixth Circuit to construe the evidence in a light most favorable to a party opposing a motion for summary judgment conflicts with the decisions of this Court and with the decisions of other circuits. Furthermore, the Sixth Circuit's decision is erroneous in that it misapplied the *Zenith* exception to the statute of limitations and deprived Petitioner of his Seventh Amendment right to present material and disputed facts to a jury. Finally, the question presented is important because this case exemplifies the confusion involving the *Zenith* exception and, unless corrected, it will serve as an erroneous precedent for other cases where an extension outside of antitrust law of this exception is sought.

Respectfully submitted,

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APPENDIX

Nos. 92-4359/4368

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILLIP M. KABEALO and
CHARLES L. KABEALO,
Plaintiffs-Appellants
Cross-Appellees,

v.

THE HUNTINGTON NATIONAL BANK,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed February 18, 1994

Before: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. The plaintiffs appeal from summary judgment in favor of the defendants in this case that arose under the "anti-tying" provisions of the Bank Holding Company Act, 12 U.S.C. §1971 et seq. (1988) (the Act). The district court held that this action was barred by the Act's four-year statute of limitations, 12 U.S.C §1977(1), rejecting the plaintiffs' contention that the statute of limitations was tolled under the facts of the case. We agree with the district court and, accordingly, affirm the judgment dismissing the action.

I.

The plaintiffs Phillip and Charles Kabealo owned all the stock in Buckeye Waste Control, Inc. (Buckeye), an industrial waste hauling company. Buckeye was a customer of and frequent borrower from the defendant Huntington National Bank (the bank). The plaintiffs alleged in their complaint that the bank violated the anti-tying provisions of the Act[1] in connection with two credit transactions, one in 1982 and one in 1984.

A.

In 1982, Phillip Kabealo discovered a landfill for sale (the Logan Landfill). When Kabealo's accountant, Robert Foster, approached the bank in October 1982 about a loan to purchase the landfill, the plaintiffs claim that the bank's loan officer refused to lend the Kabealos enough money to purchase the landfill unless Steve Hale, a business associate of the Kabealos and a customer of the bank, was joined in the deal. The bank denies that it conditioned making the 1982 loan on the Kabealos bringing in

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[1]As pertinent here, 12 U.S.C. §1972 provides:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement--
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> . . . .
>
> > (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> . . . .

Hale. Nonetheless, on November 29, 1982, Kabealo and Hale submitted a proposal that the loan be made to Phillip Kabealo and Steve Hale, on behalf of Logan Waste Control (LWC), an Ohio corporation consisting of Kabealo, Hale and Max Gehle, the original owner of the Logan Landfill. The bank committed to the loan on or about December 1, 1982.

Shortly after purchasing the landfill, Phillip Kabealo began the application process for a "Permit to Install" (PTI) from the Ohio Environmental Protection Agency (the OEPA). Such a permit would allow the landfill, which had little available space, to be expanded and thus greatly increase its value. The administrative steps to complete the process were completed in September 1986 and the OEPA granted the permit in July 1987. According to Phillip Kabealo, he located a buyer in the summer of 1987 who wanted to purchase the Logan Landfill and was willing to pay $45.9 million. This sale could not be accomplished, Kabealo claims, because Gehle and Hale sold their interests in the landfill to another company in September of 1987 for around $3 million each. Kabealo claims that had he controlled 100% of LWC (and he would have if the bank had not required a co-owner), he would have made the sale at a great profit.

B.

After LWC acquired the landfill, Buckeye continued to expand, making several acquisitions that were financed through the bank. During this time, Kabealo hired Donald Moorehead as General Manager and Christopher White as Operations Manager for Buckeye. He gave each man a 25 percent equity interest in Buckeye.

Michael Davis, a loan officer at the bank, took charge of the Buckeye account in October 1984. On October 17, 1984, Davis met with Phillip Kabealo, White and Moorehead. According to the plaintiffs, the purpose of this meeting was to discuss amortization of several Buckeye loans. According to the bank, the men discussed an additional $250,000 loan. Notes made by Anthony

Salvatore, a bank employee who was present on October 17, indicate that the meeting could have included both. On that day, Kabealo, White and Moorehead executed several documents, including a security interest in their Buckeye stock in favor of the bank.

Phillip Kabealo met with Davis again on October 18, 1984. According to Kabealo, Davis stated that the bank refused to amortize the notes unless Kabealo gave to White and Moorehead a total of fifty-two percent of the shares of Buckeye. (Since each man already owned 25 percent, this would require Kabealo to give each another 1 percent). Furthermore, according to Kabealo, Davis stated that if Kabealo did not give controlling interest in Buckeye to Moorehead and White, Davis would "flush [Kabealo] and this whole deal down the toilet."

On November 7, 1984, the Kabealos, Moorehead and White executed a close corporation agreement which accomplished the share distribution allegedly demanded by the bank. Shortly after these documents were executed, the Kabealos were fired as part of a "payroll reduction." In January of the following year (1985), the controlling shareholders removed Phillip Kabealo from the Board of Directors.

II.

The plaintiffs filed this action on November 7, 1988, four years to the day after they executed documents giving control of Buckeye to White and Moorehead, but more than six years after the alleged improper conduct of bank employees related to the Logan Landfill. Their complaint charged that in connection with both the 1982 and 1984 transactions and others the bank conditioned the extension of credit to LWC and Buckeye on the plaintiffs' providing "additional credit, property, or services" to the bank that were not usually required for such loans.

In addition to the bank, the complaint named as individual defendants bank loan officer Davis and Buckeye stockholders White and Moorehead. The complaint included several state law

claims as well as numerous claims alleging violations of the Act. After the district court dismissed the individual defendants, the bank filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim. The district court denied this motion, but following discovery the bank filed a motion for partial summary judgment.

In the face of this motion the plaintiffs eliminated all claims under the Act but those related to the 1982 and 1984 transactions described above. The district court granted summary judgment on both claims, finding both barred under the Act's four-year statute of limitations. The court's judgment dismissed the federal claims with prejudice and the state law claims without prejudice. The plaintiffs appeal from summary judgment and the bank cross-appeals from the court's denial of its motion to dismiss.

III.

We treat the parties' arguments concerning the two claims separately.

A. The 1982 Claim

1.

The plaintiffs agree that their 1982 claim accrued in October of that year when the bank allegedly made an unlawful demand that Steve Hale be associated with Kabealo in LWC as a condition for granting a loan to purchase the Logan Landfill. Thus, unless tolled, the four-year statute of limitations would bar a cause of action based on this claim. The plaintiffs argue, as they did in the district court, that the statute was tolled because their damages were "speculative" until LWC received the PTI in 1987. They rely on the rule announced by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971), that "even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." Applying this general rule

specifically to *Zenith*, which involved a claim of a continuing conspiracy by the defendant to violate federal antitrust law, the Court stated:

> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

Id.

The plaintiffs maintain that their damages were entirely speculative so long as their request for a PTI was pending. They state that the value of a landfill depends on its size, and until it was known whether they could expand Logan Landfill its value "was somewhere between $0 and $10 million." Because their future damages were incapable of proof in October 1982, the plaintiffs argue, they could not have brought "a good faith action" then or at any time within four years. Relying on *Zenith*, they state that the cause of action as to those damages did not accrue until they became provable in 1987.

2.

The bank responds with several arguments. First, the bank contends that the speculative damages rule applies only to antitrust actions, not those brought under the Bank Holding Company Act. The bank points out that *Zenith* involved a continuing conspiracy in which "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." 401 U.S. at 338. In a case such as this one, where the plaintiffs contend that a single, discrete act of the defendant violated federal law, the defendant asserts that the reasoning of *Zenith* should not apply.

The bank argues further that even if the speculative damages rule does apply in Bank Holding Company Act cases, the plaintiffs have utterly failed to carry their burden of proving that their damages were speculative at the time of the bank's allegedly unlawful act and for four years thereafter. They rely specifically on the fact that the plaintiffs submitted five-year projections of income and cash flow to the bank in connection with loan applications for loans to LWC. Furthermore, by the time the statute of limitations ran in 1986, the plaintiffs had operated the landfill for four years and had a history of its financial return. A fact-finder could have calculated damages reasonably from this information, taking into account the fact that a favorable ruling on the PTI request could result in greater profits.

B. The 1984 Claim

Unlike the 1982 claim, the 1984 claim turns on the question of when the acts of the bank alleged by the plaintiff to have violated the Act occurred and thus started the period of limitations running.

1.

The plaintiffs argue that their cause of action for the 1984 claim accrued on November 7, 1984, when they executed the documents required to comply with the bank's demand that White and Moorehead be given a majority interest in Buckeye. Conceding, as they must, that the bank made the demand on October 18, 1984, the plaintiffs argue that their injury occurred when ownership of Buckeye changed on November 7, 1984.

2.

The bank responds that the plaintiffs' own submissions to the district court, as well as other proof in the case, show clearly that any cause of action based on the bank's conduct with respect to the 1984 transaction occurred on October 18, 1984, at the latest. That was the date on which the bank committed the allegedly unlawful act-- the demand that White and Moorehead be given 52%

of the stock in Buckeye accompanied by a threat if the plaintiffs did not comply. The fact that the plaintiffs did not execute the documents required to comply with this demand until November 7, 1984 has no significance whatever. The bank cites numerous cases for the proposition that a cause of action for violation of an anti-tying provision of federal law accrues "when a defendant commits an act."

IV.

Again, we treat the claims separately, beginning with the 1982 claim.

A.

We disagree with the bank's argument that the speculative damages rule does not apply to cases under the Act. In explaining the rationale for the rule in *Zenith*, Justice White referred to "antitrust *and treble-damage actions*." 401 U.S. at 339 (emphasis added). The Act provides that a person injured by violation of the anti-tying provisions of §1972 "shall be entitled to recover three times the amount of damages sustained by him . . . ." 12 U.S.C. §1975. Thus, cases arising under the Act come within the explicit language of *Zenith*.

Furthermore, many courts have recognized that the purpose of the Act is to impose upon the banking industry the general restrictions of the antitrust laws. In discussing the text and legislative history of the anti-tying provisions of the Act, Judge Merritt, sitting by designation with the United States Court of Appeals for the Eleventh Circuit, wrote:

> It appears, therefore, that the purpose and effect of §1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying

arrangements . . . .

Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A., 679 F.2d 242, 245 (11th Cir. 1982), *rev'd on other grounds*, 474 U.S. 518 (1986). See also *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986) (paraphrasing *Parsons Steel*).

The parties have not cited, nor have we found, a case under the Act in which the statute of limitations was tolled by applying the *Zenith* speculative damages rule. In *Lancianese v. Bank of Mount Hope*, 783 F.2d 467 (4th Cir. 1986), the court affirmed summary judgment for the defendant bank in a §1972 action on the ground that the statute of limitations expired prior to the filing of the suit. The court held that the plaintiff's reliance on the speculative damages doctrine was "misplaced" because they "could have reasonably ascertained their damages and presented competent proof of them." *Id.* at 470. The clear inference from the discussion of the *Zenith* rule is that in a situation where a plaintiff could *not* reasonably ascertain and present competent proof of damages in a case under the Act, the doctrine would apply.

B.

Although we conclude that the *Zenith* rule applies to claims of tying violations under the Act, that is just the initial step in disposing of the plaintiffs' 1982 claim. As in *Lancianese*, we must determine whether the plaintiffs in the present case have shown that their damages were actually speculative. In making this determination we examine decisions involving the anti-tying provisions of federal antitrust statutes.

In *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974), we discussed rules that exempt parties from the effect of a statute of limitations as follows:

Since the above rules are in avoidance of

> the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions.

One of the "above rules" referred to was the speculative damages doctrine of *Zenith*.

In *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976), an applicant that was eventually denied a cable franchise filed suit more than four years after the last overt act of the city council refusing to reconsider its application. The plaintiff claimed that loss of future profits could not be ascertained at the time of the city council's last act and that the statute of limitations was tolled under *Zenith*. In affirming summary judgment for the defendant, the court of appeals pointed out that the plaintiff had included with its original application a projection of the number of subscribers it would attract and the gross receipts for the first five years of operation if it were awarded a franchise. *Id.* at 573. The court stated:

> Since the projections were designed to induce the council to award a franchise, the district court could conclude, in the absence of evidence to the contrary, that they were rationally based on valid assumptions. Under these circumstances, we conclude that the damages which Telecasters sought were not too speculative to prevent the cause of action from accruing at the time of the last overt act, August 7, 1967.

Id.

The *Charlotte Telecasters* court stated that it applied traditional rules, as prescribed by the Supreme Court, in determining whether damages are speculative. "These cases teach that when the defendant's wrong has been proven, 'the jury may make a just and reasonable estimate of the damage based on

relevant data, and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof.'" *Id.* (quoting *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946)) (some interior quotation marks omitted).

In *Mir v. Little Company of Mary Hospital*, 844 F.2d 646 (9th Cir. 1988), the court rejected an antitrust suit plaintiff's claim that the statute of limitations was tolled because its damages were speculative. In *Mir* the plaintiff argued that his damages for the defendant's denial of certain surgical privileges at its hospital could not be determined until related state court proceedings were concluded. The court held that mere uncertainty as to the *extent* of damages will not prevent recovery under the federal antitrust law. The plaintiff could have presented evidence of projected lost income. This "probable and inferential" proof would have provided a reasonable basis for calculating damages. *Id.* at 650.

The court in *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir.), *cert. denied*, 472 U.S. 1018 (1985), adopted the reasoning of *Charlotte Telecasters* in rejecting the plaintiff's reliance on the speculative damages rule to exempt it from the bar of the four-year statute of limitations. The court stated that absent special circumstances a plaintiff who could rely on predicted losses should not be permitted to "wait and see" if actual losses are realized before commencing an action for an antitrust violation. *Id.* at 271.

C.

Applying the foregoing principles, we conclude that the plaintiffs did not carry their burden of proving that their losses were so speculative as to excuse their failure to file this suit within the period of limitations. Their own projections and their actual experience during four years of operation would have been sufficient to provide the fact-finder with a reasonable basis for calculating their damages. If they felt that they could not present sufficiently exact evidence of damages within that time, they could

have filed suit and requested a stay until the administrative proceedings before the OEPA were concluded. They acted at their risk in waiting until the statute of limitations had run and the district court correctly determined that their action was barred.

V.

Turning to the 1984 claim, we agree with the district court that any cause of action based on that claim accrued on October 18, 1984. Thus, the present action, which was commenced on November 7, 1988, is barred.

The Supreme Court stated in *Zenith*, "Generally, a cause of action accrues and the statute begins to run when *a defendant* commits an act that injures a plaintiff's business." 401 U.S. at 338 (emphasis added). All courts that have written on the subject agree that it is the last overt act of the defendant, not any act of the plaintiff, that triggers the statute of limitations. We said so in *Akron Presform*, 496 F.2d at 233, and *Fontana Aviation, Inc. v. Baldinelli*, 575 F.2d 1194, 1195 (6th Cir.), *cert. denied*, 439 U.S. 911 (1978), and we have found no published opinion from any court that holds to the contrary.

It is immaterial that the plaintiffs did not execute the documents which formally transferred control of Buckeye to White and Moorehead until November 7, 1984. The Act is concerned with injurious actions of banks that violate its anti-tying provisions. The proscribed injury occurred when the bank made the allegedly unlawful demand on the plaintiffs, not when the plaintiffs complied.

We have examined the opinion in *Jackson v. Union National Bank of Macomb*, 715 F. Supp. 892 (C.D. Ill. 1989), which both parties have cited. That opinion merely holds that any violation of §1972 occurred "at the time of the transaction in July 1981." *Id.* at 896. From this statement the plaintiffs in the present case argue that the 1984 "transaction" was not complete until November 7. This argument has no merit. Because the plaintiffs in *Jackson* were out of time regardless of what date in July the

"transaction" occurred, it was not necessary for the court to determine the exact date. Moreover, the "transaction" referred to in *Jackson* was between the plaintiffs and the bank; the November 7, 1984, "transaction" relied upon by the plaintiffs was between them and two nondefendants. Nothing in *Jackson* detracts from the firmly settled rule that a cause of action for violation of §1972 of the Act accrues when the defendant bank commits a prohibited act that injures the plaintiff.

CONCLUSION

The district court properly granted the bank's motion for summary judgment. Having reached this conclusion we find it unnecessary to consider the bank's cross-appeal. AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

PHILLIP M. KABEALO, ET AL.,

Plaintiffs,

vs. Case C-2-88-1178

HUNTINGTON NATIONAL BANK,

Defendant.

MEMORANDUM AND ORDER

This case comes before the Court on defendant The Huntington National Bank's motion for partial summary judgment under Fed. R. Civ. P. 56.

FACTS

The facts in this case have been thoroughly set out in the parties' July 19, 1992 final pretrial order. The Court therefore will review the facts only to the extent required to decide the present motion. The dispute before the Court arose from a series of business dealings between the plaintiffs and the defendant beginning in 1976 and continuing until 1985. The plaintiffs were shareholders in and the managing officers of Buckeye Waste Control, Inc. (BWC), a corporation involved in industrial waste hauling. The plaintiffs entered into a series of loans with defendant, The Huntington National Bank (HNB), during this period. In November 1982, Phillip Kabealo and Steven Hale jointly applied for credit to purchase a landfill site called the Logan Landfill; HNB made the loan to Kabealo and Hale in December 1982. It is alleged that as a condition of this loan, HNB required

BWC to (1) guarantee the Logan Landfill loan, and (2) haul waste to the Logan Landfill rather than to sites in Columbus. In October, 1984, it is alleged that HNB required Kabealo to pledge his BWC stock as security for another loan HNB made to BWC. It is uncontroverted that Kabealo did put up his stock as security for a loan by the HNB to BWC on October 24, 1984. Further, it is alleged that HNB forced Kabealo to give up his controlling interest in BWC to other shareholders. It appears that this demand was made in a meeting held on or about October 18, 1984. (Plaintiff's Motion in Opposition at I-36; Defendant's Motion for Summary Judgment at 17.) Finally it is alleged that the October 24, 1984, loan agreement interfered with BWC's ability to borrow money from lenders other than HNB.

The plaintiff's complaint was filed November 7, 1988 asserting that HNB violated the Bank Holding Company Act, 12 U.S.C. § 1972 and Ohio law. The case proceeded through discovery, culminating in a final pretrial order on July 15, 1992. On August 7, 1992 the parties met with the Court in a conference prior to trial. At that time, the defendant, who had filed substantial motions in limine, requested leave to file this motion for summary judgment. The court granted this request, and the defendant filed its motion for partial summary judgment on August 21, 1992, followed by a supplement on August 4, 1992. The plaintiff filed a memorandum *contra* on September 4, 1992. The defendant filed a reply brief on September 11, 1992. No other documents have been filed.

STANDARD FOR SUMMARY JUDGMENT

Fed. R. Civ. P. 56(c) provides:

> [Summary judgment] . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law.

"[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)(emphasis in original); *Kendall v. Hoover Co.*, 751 F.2d 171 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is. . .[and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)); *accord County of Oakland v. City of Berkeley*, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11 (1983). In essence, though, the inquiry under

> each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)(footnotes omitted); *accord Adams v. Union Carbide Corp.*, 737 F. 2d 1453, 1455-56 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654,655 (1962); *Watkins v. Northwestern Ohio Tractor Pullers Ass'n*, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in material issues of fact, justify denial of a motion for summary judgment. *Adickes*, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex* 477 U.S. at 322. The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 252.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse

> party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific factors showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

ANALYSIS

A. PLAINTIFF'S CLAIMS UDNER [sic.] THE BANK HOLDING ACT

Based on the facts set out above, plaintiffs claim that HNB has violated the tying provisions of the Bank Holding Company Act (BHCA), 12 U.S.C. § 1972(1). Section 1972(1) states:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The defendant argues that the plaintiff's claims are barred by the Acts statute of limitations, which states:

> [A]ny action to enforce any cause of action under this Chapter shall be forever barred unless commenced within four years after the cause of action accrued.

12 U.S.C. § 1977.

The Court notes that a statute of limitations normally begins to run on the date that a defendant violates the law, thereby injuring the plaintiff. *See Akron Preoform [sic.] Mold Company v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974). The defendant asserts, and the plaintiffs do not appear to contest, that HNB's actions that are alleged to violate the Act took place over four years before the case was filed.

In their memorandum opposing the defendant's motion for summary judgment, the plaintiffs claim that the defendant committed "two clear[ly] anti-competitive acts"; these acts were (1) HNB's demand that Steven Hale "be made a party to the Logan Landfill purchase in contemplation that he would be made an equity holder in Buckeye: and (2) HNB's refusal "to extend credit to Kabealo unless he gave control of Buckeye to White and Moorehead[.]" Plaintiff's Memorandum Contra to Defendant's Motion for Summary Judgment at 75.

The uncontroverted facts listed in the parties final pretrial order show that the Logan Landfill loan was made by HNB to Kabealo and Hale on December 1, 1982. Final Pretrial Order, at 6. The plaintiffs state that Hale's participation in the loan was made a condition to HNB's granting the loan before November 29, 1982. Plaintiff's Memorandum Contra to Defendant's Motion for Summary Judgment, at 24. It seems clear that this act, which is alleged to violate the BHCA, took place over four years before this suit was filed on November 7, 1988.

Similarly, the meeting at which HNB demanded that Kabealo turn control of BWC over to White and Moorehead took place October 18, 1984. Plaintiff's Memorandum Contra to Defendant's Motion for Summary Judgment, at 35-36. HNB's violation of section 1972, presuming that it occurred, would have take place at the time the demand was made and assented to, October 18, 1982. *Id.* at 36. However, the plaintiff has not argued that its cause of action accrued on November 7, 1984, and the Court finds that the alleged violation took place on October 18, 1984, if it took place at all.

The defendant notes that the plaintiff's allege (1) that HNB required BWC to guarantee the December 1982 Logan Landfill loan and (2) that BWC was required to haul waste to the Logan Landfill as a condition for the making of the Logan Landfill loan. Defendant's Motion for Summary Judgment at 16. The defendant asserts, and the plaintiff's do not contest, that these alleged conditions arose, if at all, before the December, 1982 loan was executed; the Court therefore finds these events took place on or before December 1982.

The Court finds that all the acts alleged to violate the BHCA in the plaintiff's and defendant's memoranda on the issue of summary judgment took place before November 7, 1984; the Court must dismiss these claims unless the statute of limitations was tolled past November 7, 1984.

The plaintiffs contend that the statute of limitations was

tolled in this case under the doctrine of speculative damages described in the antitrust case of *Zenith Radio Corp. v. Hazeltine Research, Inc.* 401 U.S. 321, 338-42 (1971). In that case the United States Supreme Court found that "a plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct occurring prior to that period, if at the time of the conduct, those damages were speculative, uncertain or otherwise incapable of proof." *Akron*, 496 F.2d at 233. The plaintiffs note that similarities between the Bank Holding Company and Clayton Acts have led courts to interpret them similarly. *Jackson v. Union National Bank of Macomb*, 715 F. Supp. 892, 894 (C.D. Ill. 1989), *citing Exchange National Bank of Chicago v. Daniels*, 768 F.2d 140 (7th Cir. 1985).

Two courts have noted that antitrust doctrines construing limitations might apply the BHCA: the Unite States Court of Appeals for the Fourth Circuit in *Lacianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986) and the United States District Court for the Central District of Illinois in *Jackson, supra*. The *Lacianese* court did not specifically find that the speculative damages doctrine applies to BHCA cases. *See Lacianese*, 783 F.2d at 470. Rather, the court simply noted that application for the doctrine would not operate to toll section 1977 where a plaintiff's damages were ascertainable. *Id.* The *Jackson* court did not address the *Zenith* doctrine.

Even if the *Zenith* exception, announced by the Supreme Court in the context of an antitrust action, were applied in this action under the BHCA, plaintiffs have not met the burden necessary to defeat the application of the four-year statute of limitations. It is clear that the party seeking to avoid the effect of a statute of limitations bears the burden of proof to establish that an exception to the statute applies to his case. "All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions." *Akron*, 496 F.2d at 233. Plaintiffs have not shown that this action could not have been brought against defendant within the required four year period because of an inability to prove that they suffered any type of

damage during that time period. The passage of time may have made the alleged damages more susceptible to exact measurement and, indeed, may have caused them to increase in amount, but this does not excuse plaintiff's failure to timely bring an action for the alleged violations of the BHCA that occurred in 1982 and 1984 -- over four years before this action was commenced. Plaintiffs could have brought an action against the defendant within the required four year period; they either neglected to do so or elected to wait and to see what might happen in the future. In either event, their present claims under the BNCA are now barred by the statute of limitations.

Because the plaintiff has not shown that the time limit in 12 U.S.C. § 1977 was tolled in this case, and the Court finds that the four-year statute of limitations applies to this action, the defendant's motion for summary judgment on the plaintiff's claims under 12 U.S.C. § 1972 is **GRANTED**.

B. PLAINTIFFS' STATE LAW CLAIMS

Plaintiffs' section 1972 claims are the only basis for federal jurisdiction in this case, and the Court declines to retain pendant jurisdiction over the remaining state law claims. *See Lancianese*, 783 F.2d at 470 (dismissal of BHCA claims rendered dismissal of state law claims proper), *citing United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). The defendant has asserted that the Ohio statute of limitations is applicable to certain of these claims and asks that this Court render summary judgment as to those claims. This is a question that can be resolved by the state court if the claims are refiled in that court. Plaintiffs' state law claims are **DISMISSED WITHOUT PREJUDICE.**

CONCLUSION

It is regrettable that defendant did not move for summary judgment on its affirmative defense of the statute of limitations until after the final pretrial conference was held in this case. The delay may have been required, however, because information

indicating that the action was time barred may not have been available to the defendant until after the completion of extensive discovery and the parties' agreement on the undisputed facts set forth in the final pretrial order. In any event, the Court finds that defense to be meritorious for the reasons set forth above, and in accordance with that conclusion the Clerk is ordered to dismiss this action with prejudice to the plaintiffs' claims under the BHCA and without prejudice to plaintiffs' state law claims.

IT IS SO ORDERED.

John D. Holschuh, Judge
United States District Court